NO. 416

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

FLORENCE FLAST, *et al.*,

Appellants,

v.

JOHN W. GARDNER, *et al.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 129 national and international (*i.e.*, having members also in Canada) labor organizations having a total membership of approximately 14 million. The AFL-CIO is filing this brief for the following reasons:

1. The American labor movement has throughout its history striven for maximum educational opportunity for all children. Unions played a major role in the establishment of public schools early in the nineteenth century, and have continuously worked for the extension and improvement of public education. In line with this concern, the AFL-CIO, beginning in 1955, and before that the AFL and CIO sep-

arately, actively worked to secure the enactment of legislation to provide federal aid to elementary and secondary schools.

While there was fairly widespread recognition in the Congress of the urgent need for federal aid to education, proposals for federal assistance to primary and secondary schools were blocked for some years by controversies over racial integration and over whether church-connected schools, or their pupils, should be included in federal aid programs. Some southern Congressmen who at one time supported federal aid came to oppose it because it might implement racial integration, while certain other Congressmen were unwilling to support federal aid without some participation for parochial schools or their pupils. The 1963 AFL-CIO Convention, in its resolution on "Education," accordingly declared itself in favor of withholding federal aid from segregated schools, but as favoring a compromise on aid to pupils in church-connected schools for "resolving the bitter controversy that has so far blocked efforts to enact substantial federal aid for education."

Such a compromise was, with great difficulty, finally worked out in the Congress, and is embodied in the Elementary and Secondary Education Act of 1965. Title I of that Act provides for federal grants to public schools in "areas having high concentrations of children from low-income families." Congress authorized in excess of one billion dollars for grants under this Title in the first year. Title II of the Act provides for federal grants to States for programs to buy textbooks and library books for use in both public and private elementary and secondary schools. One hundred million was authorized for this program the first year. Thus, while only a minor portion of federal aid goes to benefit pupils in church-supported schools, they are not totally excluded from all participation.

The present suit attacks this Title II aid to private schools which are church-connected as violating the establishment of religion clause. If the Court holds that the plaintiffs have standing to maintain this suit, and if they ulitmately prevail on the merits, the solution of the church-connected school problem, which was worked out by the Congress only after years of travail and delay, will be invalidated. Further, the AFL-CIO believes that any holding banning all aid of any type to church-connected schools would probably destroy the entire program of federal aid to secondary and primary schools. It is the best judgment of the AFL-CIO that federal aid to education cannot be preserved at the present time, any more than it could be enacted in the first place, without the votes of some Congressmen who will not support a program which wholly excludes church-connected schools from all participation.

Presumably some, at least, of the plaintiffs, and of the organizations supporting them, do not wish to torpedo federal aid to education, but believe that it can be saved even if all aid to private schools is barred by court decree. The judgment, and experience, of the AFL-CIO is otherwise.[1]

2. We are convinced that the doctrine of *Frothingham* v. *Mellon*, 262 U.S. 447, that federal taxpayers cannot litigate the legality of disbursements by the Federal Government, best serves the long-run interests of the United States. We believe that a contrary rule could unduly restrict the activities of the Federal Government, could hamstring adminis-

[1] A news story in the Washington Post, November 26, 1967, p. 1, states:

> "Federal officials hope that the 1965 compromise settled the issue of relations between church and state. But six suits have already been filed to attack it.
>
> "If any of these suits succeed, benefits to parochial school children will be reduced. And that, in turn, will jeopardize the uneasy alliance in Congress that passes the annual school aid appropriations."

tration, could exacerbate relations between the judicial and other branches of the government, and could alter radically and undesirably the existing division of powers among the three branches of government.

3. We do not think that any distinction can or should be drawn whereby federal taxpayers may challenge disbursements under the establishment of religion clause, but not as violative of other constitutional or statutory provisions. Further, we believe that taxpayers' suits even if so restricted would still have a major mischief potential.

4. The Senate passed, during 1967, a bill, S. 3, introduced by Senator Ervin, which empowers any taxpayer, and, indeed, any citizen, to sue to challenge the validity, under the establishment of religion clause, of federal grants and loans under nine enumerated statutes, including the Elementary and Secondary Education Act of 1965.[2] The House Judiciary Committee did not act on this proposal; and the Senate responded by adopting, in December 1967, a rider to the appropriation for the Elementary and Secondary Education Act authorizing suits to challenge disbursements under that Act as violative of the establishment clause. This rider was dropped in conference when assurances were given by the Chairman of the House Judiciary Committee that the House would consider S. 3 at its Second (1969) Session. (See Congressional Record, Daily Print, December 15, 1967, pp. S. 18949-S. 18954).

The AFL-CIO Convention, meeting in December, 1967, expressed its strong opposition to these and any similar proposals.[3] The same considerations which lead the AFL-CIO

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[2] The 1966 Hearings on S. 2097, a predecessor of S. 3, contain a wealth of material bearing on the policy issues raised by the present suit. See *Hearings on S. 2097 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess.* (1966).

[3] The Convention resolution is printed as Appendix A hereto.

to oppose these legislative proposals apply to this suit, which seeks to achieve approximately the same results without legislation.

ARGUMENT

I

THE DOCTRINE THAT TAXPAYERS MAY NOT LITIGATE THE VALIDITY OF FEDERAL DISBURSEMENT IS SOUND POLICY

During the nearly two hundred years of this country's independent existence taxpayers have, with rare exceptions, not been able to litigate the validity of disbursements by the federal government. As early as 1793 the Justices of the Supreme Court advised President Washington that the separation of powers established by the Constitution between the three branches of government precluded the Court from rendering advisory opinions to the Executive,[4] and in *Frothingham* v. *Mellon* the Court, in holding that a taxpayer could not litigate the constitutionality of expenditures by the Federal Government, reiterated that "We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional." 262 U.S. at 488. Only when disbursements have been explicitly linked to particular taxes have taxpayers been able to challenge their validity, and the current standing of these exceptional cases[5] is far from clear.

We contend that this unavailability of a federal taxpayers suit has served the national policy well, and that a contrary doctrine would have served it ill.

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[4] See *Muskrat* v. *United States*, 219 U.S. 346.

[5] *E.g.*, *United States* v. *Butler*, 297 U.S. 1; *Helvering* v. *Davis*, 301 U.S. 619. Cf. also *Ashwander* v. *TVA*, 297 U.S. 288.

Some Presidents have taken an exceedingly restrictive view of the federal spending power.

Thomas Jefferson believed the Louisiana purchase violative of the Constitution, but went ahead anyway. He wrote John Dickenson, (August, 1803) that "* * * we must ratify, and pay our money, as we have treated, for a thing beyond the Constitution, and rely on the nation to sanction an act done for its great good, without its previous authority."[6]

In 1859 President Buchanan vetoed an act granting public lands to the States to support colleges to teach "agriculture and the mechanic arts, "* * * in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions of life." In his veto message President Buchanan declared:

> "I presume the general proposition is undeniable that Congress does not possess the power to appropriate money in the Treasury, raised by taxes out of the people of the United States, for the purpose of educating the people of the respective states."[7]

The bill actually rested on the power of Congress, under Article IV, Section 3, to dispose of "the Territory and other Property belonging to the United States"; but Buchanan asserted that this provision and the spending clause had the same reach, and that as to both "the Constitution confined Congress to well defined specific powers."

Similarly, in 1887 President Cleveland vetoed an act appropriating $10,000 for the purchase and distribution of seeds in drought-stricken counties of Texas. His veto message declared:

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[6] FOLEY, THE JEFFERSONIAN CYCLOPEDIA (1900), §4806, p. 510.

[7] V RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENT 547-549 (1909).

> "I can find no warrant for such an appropriation in the Constitution and I do not believe that the power and duty of the General Government ought to be extended to the relief of individual suffering which is in no manner properly related to the public service or benefit."[8]

However, most Presidents, fortunately as we think, have taken a broader view of the spending power. The aid to education bill which Buchanan vetoed became law as the Morrill Act in 1862 (Act of July 2, 1862, c. 130, 12 Stat. 503), and its quaint language is still part of the U.S. Code. See Title 7, §301 *ff.* (Incidentally, neither the Morrill Act nor any other in the long series of subsequent federal grants to promote higher education made any distinction between public and private institutions or between church-connected and non-church-connected institutions.[9])

Thus up until now the Federal Government has, during most of its existence, functioned on the basis of a broad view of the federal spending power, though a few Presidents (and perhaps Congresses) have adhered to more restrictive views.

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[8] VIII RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 557 (1909).

[9] Statement of Dr. John T. Fey, Representing the American Council on Education and the Association of American Colleges, *Hearings on S. 2097 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 89th Cong., 2d Sess., pt. 1, at 185-186 (1966):

> "* * * Beginning with the Land-Grant Act of 1862 there has been a continuing procession of Federal provisions for the support of education in both public and private institutions. No distinction has been made between public and private universities and colleges in ROTC programs support, training grants, medical and health-related facilities grants and in numerous other programs * * *
>
> "There are 973 regionally accredited private institutions of higher education in the United States and of these a large proportion might in some way be considered to be church-related."

What then would have been the situation if the Court during those 180 years had exercised power to pass on the constitutionality of federal disbursements? During much of that time a strict constructionist view prevailed on the Court as respects the general reach of federal power, and it seems likely that a rather narrow view of the spending power would similarly been taken. If so, activities involving federal disbursements would have been curtailed not only during periods when the President or Congress took a restrictive view of the spending power, but also whenever the Court held to that view.

Two results would in all probability have ensued.

In the first place the spending powers of the Federal Government would have been narrowly restricted over considerable periods of time. We do not think that would have been a happy result.

In the second place hostile confrontations between the judicial and executive branches, such as that which took place in the time of Thomas Jefferson and that which culminated in the "court packing" proposal of 1937, would have been more frequent and more bitter. We do not think that would have been a happy result either.

For example, although the Court in *United States* v. *Butler*, 297 U.S. 1, pronounced in favor of the Hamiltonian over the Madisonian interpretation of the general welfare clause, a reading of *Ashwander* v. *TVA*, 297 U.S. 288, decided at the same term, leaves the impression that a majority of the Court would at that time have held TVA to be beyond the powers of the Federal Government if the Court had undertaken to pass on the validity of the project as a whole.

Professor Kenneth Culp Davis, who is the leading academic critic of *Frothingham* and an advocate of federal

taxpayers' suits, thinks it regretable that the Court has never passed on the constitutionality of TVA. In a statement in support of a bill (discussed *supra* p. 4) to authorize federal taxpayers' suits, he declared:

> "Much is lost by continued uncertainty about constitutionality of spending programs, whether they have been enacted or whether they are under consideration for enactment. No lawyer today knows or can know on the basis of judicial pronouncements whether or not the TVA is constitutional; the courts have not spoken because no one has had standing to raise the question." *(Hearings on S. 2097 Before the Subcommittee on the Judiciary,* 89th Cong., 2d Sess., pt. 2, at 494 (1966).)

We disagree totally with Professor Davis. We think that no useful purpose would be served today by permitting taxpayers to challenge the constitutionality of TVA, and that it would have been exceedingly unfortunate if they had been able to challenge it in 1935 or 1936. A great and much needed public project might have been destroyed, and the confrontation between the Court and the other branches of the Government, serious enough as it was, might well have been exacerbated. We think that the Court of that period, which was not always notable for self-restraint, took the wise course in *Alabama Power Co.* v. *Ickes,* 302 U.S. 464, when it adhered to *Frothingham.*

To take another example, immediately after the *Ashwander* decision the Court, on motion of Solicitor General Reed, dismissed *United States* v. *Certain Lands in the City of Louisville,* 297 U.S. 726 (1936), in which the Court of Appeals for the Sixth Circuit had held (78 F. 2d 684) that the Federal Government had no power under the Constitution to condemn land for a housing project. Because of the *Frothingham* doctrine the Government was able, by dropping projects requiring land condemnation, to avoid a

critical test in this Court, at a time when the auspices were unfavorable, of the Federal Government's power to spend money for public housing. Ten years later the Court brushed aside in a single sentence a claim that the federal housing program was unconstitutional. *City of Cleveland* v. *United States,* 323 U.S. 329, 333 (1945). Would it have been better for the Court or the country if the issue could have been adjudicated ten years earlier in a taxpayer's suit? We think not.

Basically Professor Davis, and other advocates of federal taxpayers' suits, believe that only the courts can be trusted to insure observance of the Constitution, and that every action of the Federal Government should be subject to judicial review. Professor Davis has declared:

> "In 1923, before significant development of the Federal spending power, a system of judicial review of legislation could be sensible without a judicial check on the legality of spending, but as of 1966 a system of judicial review of legislation which does not reach spending omits about half the total impact of the Federal Government's programs. Surely no one planned and no one would plan a system of reliance on courts to check about half of what the Government does and not the other half, when both halves are about equally in need of check. * * * The time has come to re-examine the fundamentals of the unplanned system we have drifted into. The time has come, in my opinion, to make use of our American institution of judicial review not merely for half of our governmental functions but for all of them." *(Hearings, op. cit. supra note* 2, pp. 493-494.)

Again, we wholly disagree with Professor Davis.

We do not believe that the courts are the sole safeguard of the Constitution. We agree, rather, with the views expressed by Erwin N. Griswold, then Dean of the Harvard Law School and now Solicitor General. He said:

"The vice in the proposal to have 'taxpayers' suits,' it seems to me, lies in the idea that ultimate power in our country should reside with the courts. I am a great believer in our courts, and have worked hard to support them at various times, and in many ways. But, as Justice Stone said more than 30 years ago in his famous dissenting opinion in *United States* v. *Butler,* 297 U.S. 1, 87, 'Courts are not the only agency of government that must be assumed to have capacity to govern.' And as Justice Holmes said in *Missouri, Kansas & Texas Ry. Co.* v. *May,* 194 U.S. 267, 270, 'It must be remembered that legislators are the ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.'

"We have gone very far in our governmental system in turning questions over to the courts. On the whole, I think that what we have done has been wise, and that the courts have handled very well the difficult problems which have been presented to them. But, we should not think of courts as our chief governmental agency. And we cannot operate, in my opinion, under a government where all questions are turned over to the courts." *(Hearings,* p. 496.)

To permit federal taxpayers' suits would, as Professor Davis indicates, mean that every action of the legislative and executive branches of the government would be subject to judicial review. It would involve a greater intrusion of the judiciary into the other branches of government than the advisory role rejected by the Supreme Court in Washington's day; for the courts would render opinions not merely at the behest of the President but of any taxpayer.

Nor is it true, as Professor Davis seems to think, that every provision in the Constitution is judicially enforceable but for the *Frothingham* doctrine. Such provisions as the "Republican form of government" clause (Article IV, Section 4) and the provision for extradition from one State to another (Article IV, Section 2) have never been judi-

cially enforceable. We agree with Dean Griswold that the present compromise practice, under which some but not all actions of the Executive and the Congress are subject to judicial scrutiny and some but not all provisions of the Constitution are judicially enforceable, is pragmatically sound though not theoretically neat. We do not believe that it is desirable now any more than in the days of *Scott* v. *Sandford,* 60 U.S. (19 How.) 393, that the Court undertake to pronounce upon the legality of every action of the other branches of the government.

It is of course true that this Court is now firmly committed to a broad interpretation of the general welfare clause. However, there can be no guarantee that some local judges would not enjoin, as not for the general welfare, federal programs which were acutely unpopular in their particular communities.

Overruling *Frothingham* v. *Mellon* would, moreover, open up for litigation a vast range of other issues which may not be appropriate for judicial determination. Thus the courts have dismissed under *Frothingham* suits to enjoin nuclear testing on the grounds, among others, that testing violated freedom of the seas and the United Nations Trusteeship Agreement covering the north Pacific islands. *Pauling* v. *McElroy,* 278 F. 2d 252, 107 U.S. App. D.C. 372, *cert. denied,* 364 U.S. 835; *Pauling* v. *McNamara,* 331 F. 2d 796, 118 U.S. App. D.C. 50, *cert. denied,* 377 U.S. 933.

We further agree with Dean Griswold *(Hearings,* pp. 496-497) that federal taxpayers' suits could seriously burden both the federal courts and the federal departments and agencies called on to defend them. It is argued in answer that state taxpayers' suits are entertained in most jurisdictions and have not resulted in a flood of litigation. However, there are much stronger incentives for test suits against the Federal Government than against the States or

localities, and the existence of innumerable organizations dedicated to innumerable causes makes it certain that the overruling of *Frothingham* would result in a plethora of suits. Witness the number of organizations filing briefs in this Court in this case.

II

NO SPECIAL CONSIDERATIONS OBTAIN AS TO THE ESTABLISHMENT OF RELIGION CLAUSE

It is argued that the Court could overrule *Frothingham* as to suits under the establishment of religion clause without overturning it generally, and that there is particular need to permit taxpayers' suits under the establishment clause because violation of that clause will peculiarly take the form of disbursements not open to challenge except by taxpayers' suits.

We are quite at a loss as to how taxpayers can have technical standing to sue to vindicate rights asserted under one clause of the Constitution but not under another, or as to how, if that be the basis of *Frothingham,* a federal taxpayer's suit challenging a disbursement can present a case or controversy if the disbursement is claimed to violate one clause of the Constitution but not if it is claimed to violate another.

Leading academic critics of *Frothingham* do not perceive any such basis of distinction, either in law or in policy.

Thus, Professor Davis has declared:

> "The repeated idea that the law of standing should be changed to allow a challenge under a specified provision of the Constitution but not under other provisions of the Constitution and not for other kinds of illegality seems to me clearly unsound. A party who has standing to challenge for one kind of illegality that adverse-

> ly affects him should logically have standing to challenge for another kind of illegality that adversely affects him to the same extent. The judicial doors should not be opened to a party in particular circumstances to challenge govermental action under the first amendment and at the same time closed to the same party in the same circumstances to challenge the governmental action under some other provision of the Constitution or under some statutory provision." (*Hearings, op. cite supra* Note 2. p. 495.)

Professor Kauper of the University of Michigan Law School took substantially the same position. *Hearings*, pp. 507-508.

Actually under *Frothingham* there is much greater opportunity for the consideration by this Court of cases concerning the establishment of religion clause than of cases involving the general welfare clause. That is because most States do entertain state taxpayers' suits and this Court, as pointed out in *Frothingham*, can review state taxpayers' suits which involve issues under the federal Constitution. There have in recent years been numerous state court decisions interpreting the establishment of religion clause which this Court could have reviewed had it seen fit.[10]

There is nothing to the argument that under *Frothingham* the establishment of religion clause is peculiarly insulated from interpretation by this Court.

We likewise submit that it is undesirable as a matter of policy to permit federal taxpayers' suits, even if restricted

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[10] *Horace Mason League of the U.S., Inc.* v. *Maryland Board of Public Works*, 242 Md. 645, 220 A. 2d 51, *cert. denied and appeal dismissed*, 385 U.S. 97; *Dickman* v. *School District No. 62C*, 232 Ore. 238, 366 P. 2d 533, *cert. denied*, 371 U.S. 823; *Swart* v. *South Burlington Town School District*, 122 Vt. 177, 167 A. 2d 514, *cert. denied*, 366 U.S. 925; *General Finance Corp.* v. *Archello*, 93 R.I. 392, 176 A. 2d 73, *appeal dismissed*, 369 U.S. 423; *Lundberg* v. *Alameda County*, 46 Cal. 2d 644, 298 P. 2d 1, *appeal dismissed*, 352 U.S. 921.

to claimed violations of the establishment of religion clause. Obviously that would not result in as much litigation or in as wide ranging litigation as an overruling of *Frothingham* in toto. Nevertheless taxpayers' suits, even though confined to the establishment clause, could result in challenges to a long list of major federal programs.

S. 3, the proposed legislation discussed *supra* p. 4 authorizes suits to challenge loans and grants under nine enumerated statutes.[11] A witness supporting the bill pointed out, however, that there are numerous other "programs that involve Federal loan and grant authorizations to nonprofit, private organizations related to religious groups." He submitted a list of 52 such programs. *Hearings*, pp. 111-122. The list is broken down into general categories, i.e., housing; food service (such as the national school lunch program); vocational rehabilitation; Older Americans Act programs; welfare administration; public health programs; migrant programs; food for peace; international development programs; arts and humanities; economic development; education programs; and economic opportunity programs. One of the programs listed is, appropriately enough, the grants for maternal health which were the target in *Frothingham*.

The Department of Health, Education and Welfare likewise submitted a tabulation of "Federal Programs under Which Institutions with Religious Affiliation Receive Fed-

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[11] *I.e.*, (1) the Higher Education Facilities Act of 1963, (2) title VII of the Public Health Service Act, (3) the National Defense Education Act of 1958, (4) the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, (5) title II of the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), (6) the Elementary and Secondary Education Act of 1965, (7) the Cooperative Research Act, (8) the Higher Education Act of 1965, and (9) the Economic Opportunity Act of 1964.

eral Funds Through Grants or Loans." *Hearings,* pp. 367-378. This list includes numerous programs not included in the other listings. These programs include not only the whole range of Health, Education and Welfare, but programs administered by the Atomic Energy Commission, the Veterans' Administration, the National Science Foundation, the State Department, the Department of Defense, the Department of Agriculture, the National Aeronautics and Space Administration, and the Department of the Interior.

These listings of loan and grant programs do not, incidentally, include many disbursements which might be challenged by imaginative litigants, such as, for example the salaries of chaplains of Congress and the armed forces;[12] the erection and display of religious symbols, such as creches, on public property;[13] the cost of engraving "In God We Trust" on coins and bills, etc.

It is thus apparent that an overruling of *Frothingham,* even if confined to suits under the establishment clause, would result in many of the disadvantages, as we see it, of a blanket sanctioning of taxpayers' suits.

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[12] *Elliott* v. *White,* 23 F. 2d 997, 57 App. D.C. 389, dismissed under *Frothingham.*

[13] A news story in the N.Y. Times, November 29, 1967, p. 20, reads in part as follows:

> "The Clergy Association of Union [New Jersey] filed a protest Monday with Mayor F. Edward Biertuempfel on the erection of a Nativity scene on the lawn of the Municipal Building.
>
> • • • • •
>
> "The protest, in the form of a letter signed by the Rev. E. James Robert, president of the Protestant association and pastor of the Union Methodist Church, said the objections to the creche center on "the question of the propriety, if not the legality, of the site in front of the seat of local government."

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the brief for the Government, the judgment of the court below should be affirmed.

Respectfully submitted,

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APPENDIX A

COURT CHALLENGES TO FEDERAL EXPENDITURES AFL-CIO RESOLUTION NO. 216

A back-door attack on federal aid to education, civil rights, the war on poverty and many related programs has been launched in Congress and there is a serious danger that it could succeed.

The threat is in the form of a bill, S-3, which has already passed the Senate and is now being considered by a committee of the House of Representatives.

This bill would empower anyone to challenge, through a suit in federal district court, the validity under the First Amendment of any loan or grant under nine specified statutes. The nine are:

1—The Higher Education Facilities Act of 1963,

2—Title VII of the Public Health Service Act,

3—The National Defense Education Act of 1958,

4—The Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963,

5—Title II of the Act of September 30, 1950 (Public Law 874, Eighty-First Congress), identical with Title I of No. 6 below;

6—The Elementary and Secondary Education Act of 1965,

7—The Cooperative Reasearch Act,

8—The Higher Education Act of 1965, and

9—The Economic Opportunity Act of 1964.

The bill is unsound in principle and could well be disastrous in practice. It is unsound in principle because it would provide judicial review of matters which throughout the nation's history have been the province of the Congress and the Executive Department.

It could be disastrous in practice because it would be within the power of hostile courts to harass and hamstring the administration of federal programs with which they were not in sympathy.

This could be done prior to any hearing and without notice; for S-3 would allow federal district courts to issue interlocutory injunctions against "the payment of a grant or loan, or any portion thereof . . . at any stage of the proceedings." Thus even if a suit were ultimately lost, the target program could be suspended throughout the entire judicial procedure. A greater opportunity for sheer obstructionism could hardly be devised.

One source of support for this measure derives from well-intentioned Americans who believe that the very limited participation of church-supported schools in the Elementary and Secondary Education Act of 1965 violates the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion." Some contend this forbids expenditure of public funds for schools established by religious groups, even though they conform to public school standards and federal funds are not used for teaching religious subjects.

It was this issue that for so many years delayed any federal aid to primary and secondary schools, even though the urgent need for such aid was widely recognized. Finally, in 1965, a compromise was worked out in the Congress providing federal aid for certain specific purposes to students in private as well as public schools. On that basis, federal aid at last became a reality.

As early as 1963 the AFL-CIO Convention had adopted this position as a means of "resolving the bitter controversy that has so far blocked efforts to enact substantial federal aid for education." This is still our position.

Some of those who are backing S-3 sincerely feel that even peripheral public benefits to pupils in church schools, such as books and busses, run contrary to the First Amendment. As expressed in S-3, the possibility of challenge extends beyond the primary and secondary schools to church-connected colleges and universities as well, even though the latter have been receiving federal aid for more than a century. We respect the convictions of the sincere supporters of S-3 though we disagree with them. However, we believe their sincerity is being exploited by others with baser motives.

There are southern members of Congress, once supporters of federal aid to education, who now are opposed to it on the grounds that it promotes school integration. They hope the program will founder in a flood of taxpayer suits on the religious issue. There are other Congressmen who never favored federal aid but feared to oppose the compromise plan. If taxpayer suits should succeed in invalidating any form of assistance to church-established schools, they would happily revert to total opposition.

Similar considerations apply to the health and poverty programs, except that in these the racial factor is uppermost. Segregationists are taking advantage of the religious issue in education to open the way to attacks on all undertakings that aid any minority group.

Such attacks, regardless of merit, should be pressed and decided in the forum where the will of the people is most clearly represented—on the floor of the Congress. The courts cannot and should not be permitted to exercise powers that belong to the legislative branch.

S-3 opens the gates to special taxpayers suits against expenditures authorized under the terms of a law that in general cannot be challenged. The United States Supreme

Court long ago ruled that federal taxpayers cannot litigate the legality of federal disbursements. We believe this is a wise position. But under S-3 the courts would be thrust into the legislative and administrative functions of government to a degree never imagined by those who conceived the division of powers. It is ironical that many who support S-3 were among the most rancorous critics of "court interference" in the constitutional questions of school segregation and the principle of one man, one vote.

Judicial intervention of the kind authorized by S-3 would disrupt the orderly functions of a government in general and in particular, could destroy the effectiveness of the education, health and general welfare programs now in being. Therefore, be it

RESOLVED: The AFL-CIO is inalterably opposed to S-3 and any other similar measure.